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BOOK REVIEWS

A History of Mediæval Political Theory in the West. By R. W. CARLYLE and A. J. CARLYLE. Vol. II, *The Political Theory of the Roman Lawyers and the Canonists, from the Tenth Century to the Thirteenth Century.* By A. J. CARLYLE. (New York: G. P. Putnam's Sons. Edinburgh and London: William Blackwood and Sons. 1909. Pp. ix, 274.)

This volume is the second instalment of a series intended to cover the history of political theories from the second century to the sixteenth and seventeenth centuries, when, as the authors say, "the specific characteristics of modern political theory began to take shape." The first volume of this series was published in 1903, bringing the subject down to the ninth century. The time which has elapsed since the appearance of the first volume suggests the amount of labor and care devoted to the preparation of this most valuable and instructive work.

The chief significance of this work consists in its lucid exposition of political theories based upon an extensive and careful study of original texts. The abundant foot notes, which form a conspicuous feature of the work, consist almost entirely of illustrative excerpts from the writings of those authors whose views are made the subject of investigation. These excerpts are drawn from a large field of political and ecclesiastical literature and are skilfully arranged to accord with what the authors seem to believe are the essential elements of a comprehensive political theory. These elements comprise in a general way: (1) the theory of *aequitas*, or justice in the widest sense, whether expressed in the "natural law" or the "divine law;" (2) the theory of *jus*, or law as the concrete expression of equity, whether embodied in the law common to all nations (*jus gentium*) or the particular law of a single state (*jus civile*); (3) the theoretical source of political authority whereby the law is made compulsory, whether based upon the will of the people, which was the theory of the Roman jurists and the mediaeval civilians, or upon the will of God, which was the theory of the Christian Fathers and the mediaeval canonists; and (4) the theory of the relation of the secular and

ecclesiastical authorities as expounded in successive periods by both the civilians and the canonists.

It is difficult to appreciate the full significance of this second volume which treats of the theories of the mediaeval civilians and canonists, without some reference to the subject matter of the first volume, which is devoted to the theories of the Roman jurisconsults and the Christian Fathers. Indeed we may see in the progress of these two volumes a striking illustration of the continuity of political thought. For example, the mediaeval notions regarding law and equity are seen to be derived from the earlier juristic and ecclesiastical literature of the Roman Empire. Moreover, the diverse views advocated respectively by the mediaeval civilians and canonists regarding the source of political authority—views which finally emerged in the doctrines of “popular sovereignty” and of “divine right”—may be traced to the divergent theories of the Roman lawyers and the Christian Fathers. And what also seems worthy of notice, this distinction between what may be called secular and religious conceptions of the state, seems to be implied in the still earlier views of Cicero and Seneca.

So far as their ethical philosophy is concerned, both Cicero and Seneca alike drew their inspiration from the Greek stoics. But in their political theories they were far from identical. While both emphasized the principle of justice as the basis of law and the end of the state and held to the natural equality of all men, they were at variance in their views as to the origin of the state and the source of political authority. With Cicero the state is the organized body of the people and results from the natural development of human society; its authority is based upon the universal sense of justice as expressed in the popular conscience and will. His theories were thus substantially those of the Roman jurisconsults. With Seneca, on the other hand, the state is a conventional institution made necessary by the growing corruption of human nature and the degeneracy of men from a primitive condition of innocence and perfection. His views were thus somewhat similar to those advocated by the Christian Fathers. While Seneca had no clearly defined theory of “divine right,” he yet calls upon the prince to “remember that he out of all mankind has been chosen to act in the place of the gods.”

This divergence between the theories of Cicero and Seneca finds a more marked expression in the antithetical views held by the juristic and ecclesiastical writers of the empire. This statement does not mean that there were not certain fundamental ideas which were accepted in common by the Roman lawyers and the Christian Fathers. They both,

for example, adopted the theory of the "law of nature" and the natural equality of mankind, and they in common regarded slavery and certain features of the law of property as contrary to the natural law. But the Roman lawyers considered these abnormal institutions as based upon the common customs of all nations (*jus gentium*) and hence sanctioned by the positive law of a particular state (*jus civile*). But the Fathers, while accepting in a general way the juristic distinction between the *jus naturale* and the *jus gentium*, looked upon slavery and private property as inconsistent with the primitive state of man's innocence and as resulting from sin and the fall of man from his primordial condition; so that these institutions were recognized by Christian writers as a part of the "divine system of remedial discipline."

But it is with reference to the source of political authority that we find the most important cleavage between the juristic and ecclesiastical writers of the empire. We have clearly pointed out to us by abundant references the fact that the Roman lawyers expressed "one aspect of the theory out of which the mediaeval and modern democratic theory of the state has grown." The Roman *populus* was regarded by them as the ultimate source of political authority—not only under the republic, but under the empire as well. The common notion that the emperor was in theory regarded as the ultimate source of authority is usually supported by Ulpian's well known aphorism, *Quod principi placuit, habet vigorem*. But Ulpian's full statement is as follows: "What is pleasing to the prince has the force of law, since the people by the *lex regia*, which was enacted with reference to the *imperium*, conferred upon him all his authority and power (*omne suum imperium et potestatem*). This was the universal theory of the Roman jurisconsults. From the time of Julianus in the second century to that of Justinian in the sixth, it is clear that the emperor was regarded as the source of law only because the people by their own legislative act had made him so. In turning to the Fathers we find an entirely different view as to the source of political authority. According to these writers government is a divine institution made necessary by the vices of human nature, or the "fall of man from his lost estate." This is somewhat similar to the view of Seneca; but the Fathers depended mainly for its support not upon reason but upon the interpretation of Scripture. The conception which in later times became the formal theory of the "divine right" of the monarch, was in the opinion of our author first drawn out and stated by some of the Fathers, notably by St. Gregory the Great. Ambrosiaster speaks of the king as the "Vicar of God;" but St. Gregory emphasizes the claim

that the ruler, whether good or evil, must be revered as one who derives his authority from God. The early Fathers also drew up a distinct theory of the relation between the secular and ecclesiastical powers. This was most clearly stated by Pope Gelasius I, and is known as the "Gelasian theory." According to this theory the authorities of church and state are both divine, coördinate, each independent in its own sphere, and each subject in the sphere of the other.

These expositions and the excerpts upon which they are based, are exceedingly interesting to the historical student, not only as illustrating certain common legal principles of the Roman lawyers and the Christian Fathers, but especially as tracing the gradual divergence of political theories, on the one hand, in the direction of the modern doctrine of popular sovereignty and, on the other hand, in the direction of the theory of divine right.

The profound influence of the legal thought of the old Roman Empire upon subsequent times is seen in the opinions of the mediaeval civilians and canonists, which form the subject of the second volume of this series. While the author is aware that the systematic study of law in the middle ages did not begin with the founding of the great school at Bologna, a large part of his original sources are derived from writers of this school. From an examination of these sources the conclusion is drawn that the political theories of the mediaeval civilians are directly founded upon the law-books of Justinian, and that they often do little more than restate the positions laid down by the great jurisconsults of the second and third centuries. It is a noteworthy fact, however, that while they adhere quite closely to the phraseology of the ancient lawyers, they are not unaffected by the theistic influence of the Christian Church. For example, they supplemented the ancient ideas of *aequitas* and *justitia* by referring these principles to the nature and will of God. But they nowhere used such propositions to support the theory of the divine right of kings. On the contrary, they agreed substantially with the ancient lawyers in explaining the source of political authority. They held that political power is derived from the people, that the authority to make laws is founded upon the natural relation between a society and its members; and moreover, that if this authority is exercised by any particular person it is by virtue of his being recognized as the people's representative. Some of the civilians even maintained dogmatically that the emperor or prince had no arbitrary authority in legislation, but that his authority was always in some measure limited by law. It may be noticed that this theoretical view of popular sovereignty was also

in harmony with the normal conception of the new Teutonic states—that law and political authority proceed from the nation as a whole. After an examination of the writings of the civilians on this subject, our author concludes that the ordinary view that the revived study of the Roman law was unfavorable to the progress of political liberty, while it may contain some elements of truth, requires very considerable qualification—at least, so far as its influence in the twelfth and thirteenth century is concerned.

The mediaeval canonists, as well as the civilians, show their great indebtedness to the ancient juriconsults. The theories of the canonical writers were drawn largely from the "*Decretum*" of Gratian. But the treatment of law by Gratian was founded primarily upon the work of St. Isidore of Seville, who in turn closely followed the Institutes and Digest of Justinian. We consequently find in Gratian the same tripartite division of the law which Justinian derived from Ulpian, namely, the *jus naturale*, the *jus gentium*, and the *jus civile*. But the canonists emphasized the divine character of the *jus naturale*, as distinguished from the human character of the *jus gentium* and the *jus civile*. They thus resolved the tripartite division of the ancient juriconsults into the broader two-fold division—the divine law and the human law. But the natural law—which they now identified with the divine law—is in their view discoverable not simply by the human reason, as the ancient lawyers held, but by the revealed word of God, as the Christian Fathers had taught. The important consequence of this theory is apparent. The supremacy which the ancient jurists gave to the natural law as a rational principle of justice, the mediaeval canonists accord to the Scriptures, as the supreme standard to which all human law must conform. In their explanation of the source of political authority, the canonists are also in substantial agreement with the Fathers. Although they do not present a complete discussion of the origin and nature of civil society, they accept the patristic doctrine of the "fall of man," and the view that government is a divine remedy for the confusion caused by sin, and is hence a divine institution. It represents the divine authority, and "the man who sets it at naught is setting at naught the authority of God Himself." Our author declares that this is the view that prevailed with the canonical writers from the ninth to the thirteenth century.

It will be impossible in this limited space to set forth the author's explanation of the canonical theory of the canon law itself, and the nature of the authority of the church. Many texts are examined upon

these subjects, but the chief reliance is placed upon Gratian's "*Decretum*." Gratian does not, as might be supposed, identify the canon law with the divine law; and hence its validity must be judged by its conformity to a higher standard. Every canon law, the same as every civil law, which is inconsistent with the natural or divine law, is void. In estimating the relative importance of the sources of canon law, Gratian places the canons of the general councils first, and the decretal letters of the Pope second, not ignoring a certain authority attached to custom. But behind these sources lies the authority of the "natural law." in the canonical sense. The theory of Gratian is thus summed up: "The canons of the church belong to the same category as the civil law of the state. They do not represent an absolute final authority, but are rather the expressions of the authority residing in the church and its proper officers for the government of the society, subject always to the authority which lies behind the society." "But," it is claimed, "they are binding upon all the members of the society; to refuse to obey them is to refuse to obey the authority of God, from whom their authority is derived." But the difficult question as to how an appeal may be made from a canonical law—which is admittedly not final, but which must be obeyed—to a superior authority to which such law must conform, remains unanswered.

The concluding chapters of this volume are devoted to the canonical theory of the relation of church and state. In general it may be said that the fundamental theory of the whole canon law was substantially that already defined by Pope Gelasius I, wherein both authorities were regarded as equally divine, each supreme in its own sphere and subject in the sphere of the other. In its general statement this theory seems simple enough. But the attempt to delimit the spiritual and temporal spheres of authority was attended with many complexities, resulting in the greatest controversies of the mediaeval period. It is beyond the scope of the author's work to trace the history of these controversies. It is simply his task to set forth those features of the canon law which were used to support the church in its claims—not to the exercise of proper political authority, but to the exercise of spiritual jurisdiction over the holders of temporal power, and thus in effect to give the church a practical supremacy over the state. These features of the canon law are examined under the following heads: (1) the traditions in which the Papacy had apparently exercised some such jurisdiction; (2) the theory that the excommunication of temporal rulers absolves the subjects from political allegiance; (3) the theory that Peter,

and therefore his successors had received a spiritual authority which might affect secular affairs; and (4) the interpretation of the "Donation of Constantine." These several points are examined with the aid of the earlier canonical collections, the "Decretals" of Gregory IX but especially the decretal letters of Innocent III. It is made clear that even the great "arbiter of Christendom," Innocent III, makes no pretension in his letters to a general political supremacy, that he makes no claim to act as one who possesses a political authority over a temporal sovereign. He appears simply to claim the right to exercise a spiritual jurisdiction over the transgressions of a temporal prince in the same way as over the sins of any other subject of the church, and also over such cases of controversy as are, according to the canon law, transferable from a temporal to an ecclesiastical tribunal. It was only by virtue of his position as spiritual sovereign that the Pope asserted his authority over temporal rulers; and hence in the height of its power the Papacy still claimed to be acting strictly in accordance with the "Gelasian theory."

The attempt has been made, in this somewhat extended review, to indicate the distinctive subject-matter of this work and the method pursued in its investigation, as well as some of the more important conclusions drawn. It can hardly be claimed that these conclusions bear the marks of striking novelty, or will tend to modify greatly the opinions of the student familiar with the history of legal and political literature; but there are few historical students whose views will not be clarified and made more definite by following the remarkably interesting and lucid treatment of the subject as presented in these pages. There are certain critical suggestions which might be made—for example, regarding the ambiguity attached to the term *jus gentium*, and the extent to which the study of the civil law was pursued before the twelfth century—but these would be relatively unimportant in comparison with the unmistakable merits of this work as a whole.

WILLIAM C. MOREY.

Through Afro-America. An English Reading of the Race Problem. By WILLIAM ARCHER. (New York: E. P. Dutton & Co. 1910. Pp. xvi, 295.)

The portion of this book which is devoted to the subject of its title embraces the first 244 pages. Here we have the somewhat more than casual observations of a fair-minded Englishman upon the Southern